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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

TARRANT SERVICE AGENCY, INC., - Petitioner,

versus

AMERICAN STANDARD, INC.,
d/b/a THE TRANE COMPANY, - - Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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April 28, 1994

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41 pp

QUESTION PRESENTED

In a case alleging monopolization under Section 2 of the Sherman Act, must the relevant market for parts to repair and service durable goods necessarily include generic parts which are not peculiar to the durable goods themselves?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

The Petitioner, Tarrant Service Agency, Inc., has no parent company nor any partially owned subsidiaries.

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IN THE

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TARRANT SERVICE AGENCY, INC., - Petitioner,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tarrant Service Agency, Inc. ("Tarrant") respectfully prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Sixth Circuit entered in the above case on December 30, 1993.

OPINIONS BELOW

The decision and order of the United States Court of Appeals for the Sixth Circuit is reported at 12 F.3d 609 (1993) and is reproduced in the Appendix ("App.") at 1a to 14a. The decision and order of the United States District

Court for the Western District of Kentucky is reproduced at 15a to 17a.

JURISDICTION

The decision and order of the United States Court of Appeals for the Sixth Circuit was entered in the above case on December 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves claims for attempted monopolization and monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, which is reproduced at App. 18a.

STATEMENT OF THE CASE

This petition concerns the definition of the relevant product market in the aftermarket of parts for durable goods in a civil action under Section 2 of the Sherman Act. The court below, in holding that the relevant product market must include generic parts (more particularly defined below) as a matter of law, erroneously substituted its definition of the relevant market for that necessarily determined by the jury at trial; it improperly invaded the province of the trier of fact and, more importantly, failed to apply the mandate of this Court's prior decisions regarding commercial realities of aftermarket situations. This case provides the opportunity for the Court to clarify the law regarding aftermarket relevant market definition, and to provide an appropriate foundation for the promotion of beneficial competition and control of monopolistic abuses in such markets.

A. Factual Background

The defendant in this case is the industrial giant American Standard, Inc., which, through a subsidiary known as the Trane Company ("Trane"), manufactures and sells commercial and industrial heating, ventilating and air condi-

tioning equipment (hereinafter referred to as "Trane HVAC equipment"). Trane maintains a dealer network of Commercial Sales Offices ("CSOs") throughout the United States, about one-third of which are owned by Trane, the remainder being independently owned, but subject to Trane's total control (William Johnson at TR Vol 3A, 9; TR Vol 4, 22)[1]. (Mr. Johnson was Trane's Sales Marketing Manger from 1984 through the end of 1991, and is now its Director of Applied Marketing for the Asia, America Zone.)

All of the CSOs have specific territorial assignments; although each is permitted to sell from its inventory to any customer, they are prohibited by Trane from drop shipping outside their respective territories. (William Johnson at TR Vol. 3A, 23-26). Each CSO sells new Trane HVAC equipment and parts for the repair of that equipment; the CSOs also service installed Trane equipment in direct competition with independent service organizations ("ISOs") who make their livelihood servicing and repairing HVAC equipment.

Plaintiff-Petitioner, Tarrant Service Agency, Inc., is engaged in the business of selling service and repair parts exclusively for Trane HVAC equipment. Tarrant also provides technical assistance to independent HVAC contractors in servicing and repairing Trane HVAC equipment (Lane Tarrant at TR Vol 1, 65).

In 1970 Tarrant's president, Robert Lane Tarrant, acquired the Trane CSO franchise in Louisville, Kentucky (Lane Tarrant at TR Vol 1, 53,54). In 1976, Mr. Tarrant became an Authorized Parts Outlet ("APO") for Trane, at which time he founded the Tarrant Service Agency. In 1986, Trane decided to eliminate the APO system, and

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[1]References to the trial transcript are designated herein as TR, followed by the volume and page numbers where the cited portion of the evidence may be found.

terminated Tarrant's APO relationship about a year later. (Lane Tarrant at TR Vol 1, 60, 61; Plaintiff's Trial Exhibit No. 2).

Beginning in 1987, Tarrant purchased Trane genuine parts in the open market from Trane CSOs (Lane Tarrant at TR Vol 1, 63,68), and also purchased some duplicator parts (i.e., parts manufactured and sold by independents as equivalents to some of the Trane genuine parts) which it was able to obtain from other sources (Lane Tarrant at TR Vol 1, 62,63). In September, 1990, Trane instituted its "Broker Policy" under which it forbade any of its CSOs to sell to anyone whom it classified as a broker which it defined as follows:

> A purchaser of Trane parts which engages principally in the resale of such parts on the basis of regional or national solicitation of mail or telephone orders, using third party delivery services . . . without providing point-of-sale services to the customer.

(Lane Tarrant at TR Vol 1, 69; Plaintiff's Trial Exhibit No. 5).

Trane immediately classified Tarrant as a broker and Tarrant was, up to the date of trial, the only entity against whom the Broker Policy had been utilized (William Johnson at TR Vol 3A, 14). Furthermore, although the Broker Policy purportedly reserved to Trane the exclusive right to sell parts to brokers, since November 1, 1990, Trane has refused to make any sales to Tarrant (William Johnson at TR 3A, 14). As a result, Tarrant was no longer able to purchase any Trane genuine parts through CSOs (Lane Tarrant at TR Vol 1, 73) or from Trane itself.

Tarrant commenced this action shortly after institution of the Broker Policy, and the case was tried on Tarrant's claims of monopolization and attempted monopolization in violation of Section 2 of the Sherman Act.

B. The Proceedings Below

The trial court instructed the jury that the relevant product market would include the products within it which compete with each other from the buyer's point of view. He further instructed the jury that the relevant market might include *any* of the following: Trane genuine parts, duplicator parts and generic parts (products incidental to the servicing of Trane HVAC equipment which have a multitude of other uses). (Rubin, J., at TR Vol. 6B, 45-46).

On a special verdict, the jury found that Trane had attained monopoly power, that it had attempted to monopolize, and that it had the power to exclude competition. In view of the evidence submitted, the relevant market necessary to support a finding of monopoly power would necessarily exclude generic parts, since Tarrant did not propose a definition which included such parts, and Trane's evidence would have established market share well below 50% had generic parts been included. In addition, the jury rejected the business justifications proffered by Trane for its conduct and gave judgment for the plaintiff.

The district court, however, granted Trane's motion for judgment in its favor as a matter of law. (See App., 15a). It ruled that the outcome was controlled by a pre-*Kodak*[2] case, *International Logistics Group, Ltd.* v. *Chrysler Corp.*, 884 F.2d 904 (6th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990) in which the Sixth Circuit had rejected the concept that a manufacturer could monopolize the parts aftermarket for its own brand of durable goods. The trial court did not reject the jury's findings that Trane had market power in a relevant market or that it had monopolized or attempted to monopolize that market.

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[2]*Eastman Kodak Co.* v. *Image Technical Services, Inc.*, ___ U.S. ___, 112 S.Ct. 2072, 119 L.Ed.2d. 265 (1992).

On appeal, the Sixth Circuit affirmed the trial court's judgment, albeit on totally different grounds. (See App., 1a). It held that the relevant market must as a matter of law include generic parts, and that Trane had not been shown to have monopoly power in that broader market. The Court of Appeals stated:

> Clearly, one brand of a product can constitute the relevant market when the product is unique and no reasonable substitutes exist. However, the case before us is not such a case. Three categories of parts exist which are used in the servicing and repair of Trane equipment: Trane genuine parts, duplicator parts, and generic parts. Thus, this case does not represent one of those circumstances where a single product constitutes a relevant market.

App., 7a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's opinion raises a question of broad importance in evaluating the exercise of monopoly power in durable product aftermarkets: whether the relevant market must include generic parts with myriad other uses (and available from countless sources) or should be limited to those parts peculiar to that aftermarket for which there are no generic substitutes. The Sixth Circuit's ruling on this issue is both profoundly wrong in the context of the case and broadly disturbing insofar as it eviscerates *Kodak*.

I. THE DECISION BELOW INVOLVED AN UNWARRANTED DISREGARD FOR THE JURY'S RELEVANT MARKET DETERMINATION

The Sixth Circuit clearly erred in ruling that the relevant market included generic parts as a matter of law. Whether a particular product or service is included in the

relevant market is a question of fact for the trier of fact.[3] There was ample evidence in the record from which a jury could conclude that the generic parts were irrelevant to customer purchasing practices; whereas generic parts were available from a multitude of sources who did not offer parts unique to Trane HVAC equipment, and whereas the generic parts were customarily bought from such sources, the customer's choices for parts unique to Trane HVAC equipment were severely limited to either the Trane CSOs or the few independents providing such parts, of whom Tarrant was by far the largest.

Trane itself recognized that the ISOs preferred to purchase the noninterchangeable parts for Trane HVAC equipment from a single source (William Johnson at TR Vol. 4, 70-71), whereas generic parts could be and routinely were acquired from other sources, and represented only a nominal portion of Trane's parts sales. ". . . generic parts are almost always procured locally in the market and, therefore, . . . you [Trane] wouldn't have much reason to see much of this business . . ." (William Johnson at TR Vol. 4, 25).

More significantly, the customers recognized that they had only two practical choices for noninterchangeable parts for Trane HVAC equipment: the few independents like Tarrant who deal in those parts and their local Trane CSO.

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[3]*International Boxing Club* v. *United States*, 358 U.S. 242, 245, 251 (1959); *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 381 (1956); *High Technology Careers* v. *San Jose Mercury News*, 996 F.2d 987 (9th Cir. 1993); *Syufy Enters.* v. *American Multicinema, Inc.*, 793 F.2d 990, 994 (9th Cir. 1986) (must affirm jury's conclusion on relevant market "as long as, viewing the evidence in a light most favorable to the nonmoving party, the jury's verdict is supported by substantial evidence"), *cert. denied*, 479 U.S. 1031 & 1034 (1987); *see generally* cases collected at ABA Antitrust Section, *Antitrust Law Developments*, 199 n.19 (3d Ed. 1992).

(John A. Trubee Depo. at TR Vol. 3B, 99-100; Tegwyn Honey Depo. at TR Vol. 3B, 71-72). The generic parts sources did not carry either the genuine Trane parts or duplicator parts necessary to the repair of Trane HVAC equipment. Furthermore, the independent service contractors preferred to purchase parts from a supplier that was not competing with them in the service business. (Wesley Burns at TR Vol 2, 168; Darrell Scarborough at TR Vol 2, 180-183; John Samsa at TR Vol 2, 154-155).

There was evidence from which the jury could and necessarily did find that the relevant market did not include providers of generic parts, but only those suppliers who could offer the noninterchangeable parts necessary to service and repair Trane HVAC equipment (including both Trane genuine and duplicator parts).

II. THE COURT BELOW FAILED TO RECOGNIZE THE COMMERCIAL REALITIES IN DURABLE GOODS AFTERMARKETS, AND FAILED TO APPLY THE MANDATE OF THIS COURT'S PRIOR DECISIONS REGARDING SUCH SITUATIONS

Considerable evidence was adduced at trial regarding the relevant product market in this case. Tarrant's evidence demonstrated that there are approximately 5,000 parts peculiar to Trane HVAC equipment which cannot be used with other equipment. Tarrant was able to obtain approximately 1,200 of those parts as duplicators; i.e., parts manufactured and sold by independents as equivalents to some of the Trane genuine parts. (Jeffrey Powell at TR Vol 2, 197). The remaining Trane genuine parts were purchased by Tarrant from Trane CSOs.

Tarrant's expert, Donald F. Blumberg, testified on the basis of a study which he conducted that the relevant antitrust market consisted of either (1) parts uniquely compatible with Trane HVAC equipment, (*i.e.*, Trane genuine parts and duplicator parts), in which Trane had a 90% share, or

(2) Trane genuine parts alone, in which Trane had a 95% share. (Donald Blumberg at TR Vol 2, 20-25). Trane maintained that the relevant market included generic parts, and that its share of less of that enlarged market was less than 30 percent.

In overturning the jury's verdict, the Court of Appeals not only failed to apply the appropriate standard of review,[4] but employed legal reasoning fundamentally inconsistent with established precedent on the definition of a relevant market. The relevant market in this case includes only Trane genuine parts and duplicator parts for Trane HVAC equipment. Definition of the relevant product market turns on discovering patterns of trade which are followed in practice,[5] and must correspond to the commercial realities.[6]

The relevant market of only Trane genuine and duplicator parts is also the appropriate one in this case under the "practical indicia" test enunciated in *Brown Shoe Co.* v. *U. S.*, 370 U.S. 294 (1962) which provides:

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[4]The Sixth Circuit clearly failed to "view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences." *Phelps* v. *Yale Sec., Inc.*, 986 F.2d 1020, 1023 (6th Cir. 1992), *cert. denied*, 114 U.S. 175 (1993).

[5]*United States* v. *United Shoe Mach. Corp.*, 110 F.Supp. 295, 303 (D. Mass 1953), *aff'd*, 347 U.S. 521 (1954).

[6]*See, e.g., Illinois ex. rel. Hartigan* v. *Panhandle E. Pipe Line Co.*, 730 F.Supp. 826, 901 (C.D.Ill. 1990) (fact that defendant theoretically competed with others is irrelevant because they were not effective alternatives to customers), *aff'd sub nom. Illinois ex rel. Burris* v. *Panhandle E. Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991); *Drabbant Enters.* v. *Great Atl. & Pac. Tea Co.*, 688 F.Supp. 1567, 1579-80 (D.Del. 1988) (relevant market for shopping is determined by actual shopping practices of customers).

> . . . within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. . . The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

370 U.S. at 325.

The proof in this case left no question that this relevant submarket was well defined by industry recognition of the submarket as a separate economic entity, its products' peculiar characteristics and uses and its specialized vendors. The industry, here the customers for parts to repair and service Trane HVAC equipment, understood and considered the sources for parts unique to Trane HVAC equipment as separate and distinct from the numberless sources for generic parts. Parts unique to Trane HVAC equipment, by definition, have peculiar characteristics and uses not shared by generic parts; and finally, those vendors handling parts compatible only with Trane HVAC equipment are obviously specialized.

Analogous situations have been faced by other courts in cases where a firm offers a "cluster" of products or services rather than a single product. In such cases, those courts have concluded that only firms offering a similar cluster should be included in the relevant market.[7] For example, the Supreme Court has held that the relevant market for commercial banks consists only of those "full service" banks that offer a similar cluster of products and services and does not include other financial institutions,

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[7]*See generally*, J. von Kalinowski, *Antitrust Laws and Trade Regulation*, Volume 3, §18.02[3] (1993).

such as thrifts, loan companies, mutual funds, etc., that offer only a few of the financial products.[8] The Court reached a similar conclusion about the cluster of protection services (fire, burglary, watchmen) provided by central station reporting companies accredited by insurers.[9]

More recently, a federal district court issued a preliminary injunction against a merger of two grocery store chains based on a definition of the relevant market which included only full-line grocery stores with more than 10,000 square feet, and excluded other stores, such as convenience stores and bakeries, that offered only a limited range of competitive products.[10] The *Tarrant* Court was wrong to insist — despite the jury verdict — that the relevant market must include generic parts, when trade realities dictate that Trane genuine parts plus duplicator parts is the meaningful definition in the eyes of the customers in the Trane HVAC equipment aftermarket.

The *Tarrant* decision is in this respect in conflict with a recent decision of the Court of Appeals for the Seventh Circuit. *United States* v. *Rockford*, 898 F.2d 1278 (7th Cir. 1990). In that case, which concerned the merger of two acute-care hospitals, the defendants argued that a growing number of services provided by acute-care hospitals were also available from non-hospital providers, such as doctors' offices and clinics. The Seventh Circuit rejected this at-

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[8] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 359-60 (1963); *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350 (1970).

[9] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572-73 (1966) (no substitute for accredited central station service meets the interchangeability test of the du Pont case).

[10] *State of California* v. *American Stores*, 697 F. Supp. 1125 (C.D. Cal. 1988). aff'd, *State of California* v. *American Stores Co.*, 872 F.2d 837, 841 (9th Cir. 1989) (no abuse of discretion).

tempt to expand the market beyond hospitals providing acute care:

> For many services provided by acute care hospitals, there is no competition from other sorts of providers. . . . The fact that for other services you have a choice between inpatient care at such a hospital and outpatient care elsewhere places no check on the prices of the services we have listed, for their prices are not linked to the prices of services that are not substitutes or complements.

898 Fed.2d at 1284. Judge Posner stated the general principle thus:

> If a firm has a monopoly of product X, the fact that it produces another product, Y, for which the firm faces competition is irrelevant to its monopoly unless the prices of X and Y are linked.

Id.

In *Tarrant*, the Sixth Circuit wholly failed to adhere to this principle. It did not identify *any* evidence that the prices of generic parts would have a restraining influence on the thousands of genuine Trane parts for they were not interchangeable. Considering the multitude of vendors for generic parts, it is obvious that no cross-elasticity of demand exists between generic parts on the one hand and Trane genuine parts and duplicator parts on the other. The court below had no basis in the record to support a conclusion that the jury's verdict must have rested on the broader relevant market which was the *sine qua non* of its decision.

The Sixth Circuit's decision is based upon a misapplication of the "interchangeability" test from this Court's opinion in *du Pont*. Because generic parts were used in the service and repair of Trane HVAC equipment, the appellate court concluded that generic parts were necessarily part of this relevant market. However, this

holding ignores the commercial dynamics of this and similar aftermarkets. Upon consideration of these facts, it becomes apparent that true competition exists only between purveyors of noninterchangeable parts (to service any durable goods), while there is a virtually complete absence of competition between those entities and the many sources of generic parts which may also be used in servicing the same durable goods. Inclusion of the generics would expand the relevant market in a way that did not correspond with commercial reality or with established case law.[11]

III. Implications

The *Tarrant* decision has broad implications for the scope of antitrust protection in the aftermarkets created by long life, high cost durable goods. As this court recognized in *Kodak*, our economy presents many situations in which consumers may become "locked in" to durable items purchased from an original equipment manufacturer and hence susceptible to the improper exercise of market power.[12] In situations like commercial HVAC equipment, the sunk investment is large, the durable good has a long useful life expectancy and the switching costs make it economically unfeasible for an owner to opt out of the monopolistic control of the aftermarket once he has made the initial investment. An economically realistic view of such aftermarkets must take into account not only the durable good and aftermarket part manufacturer and the end user, but also the roles played in the aftermarkets by indepen-

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[11]*See, e.g., Thurman Indus.* v. *Pay 'N Pak Stores*, 875 F.2d 1369, 1374 (9th Cir. 1989) ("For antitrust purposes, defining the product market involves identification of the field of competition: the group of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.").

[12]*Kodak* at 2087-2088.

dent sellers of noninterchangeable parts and the independent service providers.[13]

The high cost and complexity of many forms of modern machinery, the need for other systems compatible with certain technologies, and the higher degree of training required for sophisticated equipment have made such lock-ins more prevalent. At the same time, the long-term needs of consumers for highly specialized repair and replacement services have increased the financial importance of the aftermarkets.[14]

The exercise of market power by original manufacturers of durable equipment is reflected in high prices for replacement parts. For example, the cost of constructing an automobile from replacement parts, not including the cost of assembly, has been estimated to be eight times the cost of buying a fully assembled automobile.[15] Other industries commonly affected by the exercise of market power in the aftermarket include aircraft, farm machinery, naval pumps and equipment, trucks, recreational vehicles, pleasure boats, medical machinery, computers, mining machinery, furnaces, powdered coating equipment, oil drilling equipment, engines, valves, and painting equipment.[16]

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[13]*See, e.g., Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 29-30 (3d Cir. 1978)* (perceptions of consumers, not manufacturers, are most salient in determination of market boundaries), *cert. denied*, 439 U.S. 876 (1978).

[14]*See generally*, J. Voortman, *Curbing Aftermarket Monopolization*, 19 Journal of Legislation 155 (1993) ("Voortman"); R. D. Young and A. P. Cho, *The Impact of Kodak on Antitrust Litigation*, 72 Michigan Bar Journal 1278 (December 1993, No. 12); Joseph Kattan, *Market Power In The Presence of An Installed Base*, 62 Antitrust L.J. 1 (Summer 1993) ("Kattan").

[15]Voortman, at 158.

[16]*Id.* at 159-60.

Kodak offered a counterweight to the anti-competitive forces operating in such aftermarkets. Where, as in the HVAC market, information on future prices of parts is virtually unavailable to permit life-cycle pricing at the time of original purchase, the aftermarket may and should be analyzed separately to determine whether anti-competitive conduct has occurred. Moreover, under the market definition methodology of the federal Merger Guidelines, replacement parts for a particular supplier's durable goods typically will constitute a relevant product market because installed owners usually will not substitute a new durable good to avoid a small but significant price increase by a replacement part monopolist.[17] As Mr. Kattan noted, ". . . in many cases the suppliers of a durable good will be the only suppliers of *some* replacement parts or other complementary goods.[18]

The *Tarrant* decision undermines that analysis and ignores the commercial realities of aftermarkets by compelling the inclusion of all generic parts in the definition of the relevant market. In virtually every one of the industries mentioned above (no matter how sophisticated the technology) some of the service and repair parts in the aftermarket will be generic and will not be unique to the manufacturer's product — belts, pulleys, fasteners, transistors, lubricating oils, etc. Those parts will be irrelevant to the consumer purchasing decisions for the noninterchangeable parts, since the sources of generic parts do not offer the parts unique to the equipment. But the Sixth Circuit's holding that, as a matter of law, all sources of generic parts must be included in the relevant market,

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[17]*See* Kattan at 5, citing to the U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1.11 (April 2, 1992) *reprinted in* 4 Trade Reg. Rep. (CCH) paragraph 13, 104.

[18]Id.

will establish vastly larger markets and lower market shares than reflect the real economic forces obtaining in the aftermarkets for durable goods.

Distributors and consumers will be able to demonstrate anti-competitive conduct by manufacturers in the aftermarkets only if a realistic market definition is used. The promotion of beneficial competition and control of monopolistic abuses in such markets will be severely impeded if the Sixth Circuit's misapplication of the relevant market concept is allowed to stand. If the public policy considerations reflected by the Court's decision in *Kodak* are to be preserved, the Sixth Circuit's decision must be reviewed and reversed.

CONCLUSION

For these reasons a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-6434/91-6497

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TARRANT SERVICE AGENCY, INC., - - *Plaintiff-Appellant, Cross-Appellee,*

v.

AMERICAN STANDARD, INC., d/b/a THE TRANE COMPANY, - - *Defendant-Appellee, Cross-Appellant.*

On Appeal From the United States District Court for the Western District of Kentucky

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JUDGMENT—Decided and Filed December 30, 1993

Before: KENNEDY, MILBURN, and GUY, Circuit Judges.

KENNEDY, Circuit Judge. Plaintiff, Tarrant Service Agency ("Tarrant"), appeals the District Court's order granting defendant, American Standard, Inc. d/b/a The Trane Company ("Trane"), judgment as a matter of law after the jury had returned a verdict for Tarrant in this action for monopolization and attempted monopolization. Although the District Court granted Trane judgment as a matter of law on these claims, Trane cross-appeals the District Court's refusal to grant Trane's alternative motion for a new trial on the monopolization and attempted monopolization claim.

Tarrant also appeals the District Court order granting Trane summary judgment on its conspiracy to monopolize claim and its group boycott claim.

Trane cross-appeals the District Court's denial of judgment as a matter of law for Trane, after the jury returned a verdict for Tarrant, on Trane's counterclaim for trademark infringement and unfair competition. Trane also appeals the District Court's refusal to submit Trane's copyright infringement counterclaim to the jury. For the reasons stated below, we affirm in part and remand in part.

I.

Trane manufactures and sells commercial and industrial heating, ventilating and air conditioning ("HVAC") equipment. Trane sells Trane genuine parts necessary for the repair of its equipment through Commercial Sales Offices ("CSOs") which are located throughout the United States. Some CSOs are owned by Trane and others are independently-owned franchises. The CSOs sell repair parts and also repair Trane equipment. Trane also sells a small amount of Trane parts through its national parts outlet. The ultimate purchasers of these repair parts are the owners of Trane's equipment who repair their equipment and independent service contractors who service Trane and other equipment.

Tarrant is a mail-order parts business which sells genuine and duplicator parts strictly for the service and repair of Trane's commercial HVAC equipment. Tarrant does not repair HVAC equipment itself. Tarrant previously bought Trane genuine parts from the CSOs and then directly competed with the CSOs by selling parts to service contractors and owners of Trane equipment.

Three categories of parts exist which are used in the servicing and repair of Trane equipment. First, there are Trane genuine parts which are produced or sold by Trane itself. Second, there are duplicator parts which are specifically engineered as substitutes for Trane genuine parts but are made by manufacturers other than Trane. Duplicator parts are not interchangeable with parts for other

brands of HVAC equipment, but are available from a variety of manufacturers. The third category of parts used in Trane equipment repair is generic parts. Generic parts are used in Trane equipment and other manufacturer's equipment, and for numerous other purposes. These generic parts are available from numerous sources.

From 1987 until September 1990, Tarrant purchased Trane genuine parts from Trane CSOs. However, in September 1990, Trane unilaterally instituted a broker policy which forbade the CSOs from selling to anyone that Trane classified as a broker.[1] Trane reserved the right to sell to such brokers itself. Initially, Trane classified Tarrant as a broker but refused to sell to Tarrant itself because it believed Tarrant was passing off duplicator parts as genuine Trane parts. Additionally, Trane was concerned that Tarrant was a free-rider. Trane believed that Tarrant was a free-rider because Tarrant sought to sell Trane genuine parts at wholesale in competition with Trane's distribution system. Trane believed Tarrant was exploiting the cost advantage it had over CSOs as Tarrant would not maintain inventories or other sales presence in the local market.

Although Tarrant increased its sale of duplicator parts, Tarrant wanted to buy Trane genuine parts. Because Tarrant was unable to buy genuine parts, it instituted this antitrust action. Tarrant claims that Trane monopolized the distribution of parts for repair of Trane equipment and that Trane violated section two of the Sherman Act by initiating the broker policy and refusing to sell Trane genuine parts to Tarrant. Tarrant also claimed that Trane violated section one of the Sherman Act because Trane conspired with independently-owned CSOs to restrain trade

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[1]Trane defined a broker as, "[a] purchaser of Trane parts which engages principally in the resale of such parts on the basis of regional or national solicitation of mail or telephone orders, using third party delivery services . . . without providing point-of-sale services to the customer." Defendant's Brief at 7-8.

in the relevant market. Furthermore, Tarrant contends that Trane and its CSOs effectuated a group boycott in violation of section one of the Sherman Act,

Prior to trial, the District Court granted Trane's summary judgment motion on the section one claims, finding no evidence of an agreement or a combination. Tarrant's section two claims were tried to the jury and the jury returned a verdict for Tarrant.[2] After the jury returned the verdict, Trane moved for judgment as a matter of law and in the alternative for a new trial. The District Court granted Trane judgment as a matter of law; however, the District Court denied without explanation Trane's alternative motion for a new trial. The District Court reasoned that *International Logistics Group, Ltd* v. *Chrysler Corp.*, 884 F.2d 904 (6th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990), dictated judgment as a matter of law for Trane. On the basis of *Chrysler*, the District Court apparently concluded that Trane could not be liable for an antitrust violation when it only monopolized the distribution of its own brand of parts. The District Court noted it was aware of *Eastman Kodak Co.* v. *Image Technical Servs.*, 112 S.

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[2]The jury made the following findings:

> Do you unanimously find by a preponderance of the evidence that defendant American Standard, Inc., doing business as the Trane Company (Trane), has attained monopoly power in the relevant product market?
>
> Jury: Yes.
>
> Do you unanimously find by a preponderance of the evidence that Trane has attempted to monopolize the relevant product market?
>
> Jury: Yes.
>
> Do you unanimously find by a preponderance of the evidence that defendant Trane had the power by reason of its monopoly or attempted monopoly to exclude competition whenever they desired to do so?
>
> Jury: Yes.

Ct. 2072 (1992), but concluded that *Kodak* was inapplicable to the case *sub judice*.

Additionally, the jury returned a verdict for Tarrant on Trane's counterclaims for trademark and unfair trade practices.[3] Trane also moved for judgment as a matter of law on these claims or in the alternative for a new trial. The District Court denied Trane's motion.

II.

This Court reviews a court order granting judgment as a matter of law under the same standard that the District Court used. *Pheps* v. *Yale Sec., Inc.*, 986 F.2d 1020, 1023 (6th Cir.), *cert. denied*, 114 S. Ct. 175 (1993).

> We do not weigh the evidence, evaluate the credibility of the witnesses, or substitute our judgment for that of the jury. Instead, we must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. The motion should be granted, and we should affirm if reasonable minds could not come to a conclusion other than one in favor of the movant.

Id. (citations omitted).

III.

Section two of the Sherman Act prohibits illegal monopolization. Illegal monopolization consists of "(1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." *United States* v. *Grinnell Corp.*, 284 U.S. 563, 570-71 (1966).

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[3]With regard to the counterclaims, the jury made the following findings:

> Do you unanimously find by a preponderance of the evidence that Tarrant infringed at any time upon the trademark Trane, Centravac or the Trane logo?
>
> Answer: No.

The jury concluded that Trane had engaged in illegal monopolization but the District Court granted Trane judgment as a matter of law relying on *Chrysler*, 884 F.2d at 904. In its decision, the District Court relied on the following statement from *Chrysler*,

> Obviously, Chrysler's sales to its dealers must be immediately excluded from the definition of relevant product market in the instant case. Chrysler could have unilaterally required its franchised dealers to purchase their parts exclusively from Chrysler. Thus the dealer market existed at Chrysler's option. Chrysler could not be charged with restraining trade in this market. . . . A manufacturer is entitled to the benefits of maintaining a "monopoly" over products which it has developed and produced. Indeed, if manufacturers were denied a monopoly over their own unique products, the incentives for innovation and development of beneficial products would be stifled. Accordingly, Chrysler committed no § 2 Sherman Act violation when it implemented its marketing programs for its Power Master engines or its own manufactured parts. *Monopolization of a single brand is not an antitrust violation.*

Id. at 908 (citations omitted)(emphasis added).

On appeal, Tarrant argues that Trane has unlawfully monopolized a single brand, Trane genuine parts. Further, Tarrant argues that the District Court's reliance on *Chrysler* was erroneous as monopolization of a single brand can constitute an antitrust violation under the Supreme Court's recent decision in *Kodak*, 112 S. Ct. at 2072.

In *Kodak*, plaintiffs, independent services organizations ("ISOs"), repaired and serviced Kodak copying machines and micrographic equipment, sold Kodak parts and sold used Kodak equipment. Kodak's photocopier and micrographic equipments is unique and Kodak parts are not compatible with equipment made by other manufacturers. *Id.* at 2077. Defendant Kodak also provided service and parts for its machines to its customers. Kodak adopted policies which limited the sale of replacement parts for its equipment to "buyers of Kodak equipment who use Kodak

service or repair their own machines," and limited the ISOs' access to other sources of Kodak parts. *Id.* at 2077-78. The ISOs brought an antitrust action alleging that Kodak violated section one of the Sherman Act with its illegal tying practices and violated section tow of the Sherman Act through its unlawful monopolization and attempted monopolization of Kodak parts. *Id.* at 2075. With regard to the section two claim, Kodak argued that monopoly power did not exist because a single brand of a product can never constitute a relevant product marked under the Sherman Act. The Supreme Court rejected Kodak's proposition stating:

> Because services and parts for Kodak equipment *are not interchangeable* with other manufacturers' service and parts, *the relevant market from the Kodak-equipment owner's perspective is composed of only those companies that service Kodak machines.* This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market.

Id. at 2090 (citations omitted)(emphasis added).

Clearly, one brand of a product can constitute the relevant market when the product is unique and no reasonable substitutes exist. However, the case before us is not such a case. Three categories of parts exist which are used in the servicing and repair of Trane equipment: Trane genuine parts, duplicator parts, and generic parts. Thus, this case does not represent one of those circumstances where a single product constitutes a relevant market.

Next, Tarrant argues that even if this is not a case of single brand monopolization, then the relevant market only includes Trane genuine parts and duplicator parts. To support its exclusion of generic parts, Tarrant points to the following quote from *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), "[i]n considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by con-

sumers *for the same purposes* make up that 'part of the trade or commerce' monopolization of which may be illegal." *Id.* at 395 (emphasis added). Tarrant argues that generic parts should not be included within the relevant market because generic parts, by definition, are produced and sold for different uses. Thus, generic parts cannot satisfy the "reasonably interchangeable by consumers for the same purposes" test.

Contrary to Tarrant's contention, parts need not be peculiar to a market in order to be part of a relevant market. Although generic parts can be used for a multitude of different purposes, they can certainly be used for the same purpose of repairing Trane products. Thus, generic parts have reasonable interchangeability with Trane genuine parts for the purpose of repairing Trane equipment and are part of the relevant market.

Next, Tarrant must prove the existences of monopoly power within the relevant market of Trane genuine parts, duplicator parts and generic parts. Monopoly power within the relevant market is "the power to control prices or exclude competition." *Grinnell,* 384 U.S. at 571. *See also Byars* v. *Bluff City News Co.,* 609 F.2d 843, 850 (6th Cir. 1979) ("The material consideration in determining whether a monopoly exists, is not that prices are raised and the competition is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so.").

Courts often look at market share as a short cut to determine if monopoly power exists. *Id.* Tarrant's evidence of monopoly power limited the market to genuine and duplicator parts. Thus, Tarrant did not produce evidence of Trane's market share in the relevant market and Tarrant cannot rely on market share as an indicator of monopoly power.

Tarrant alternatively argues that even if Trane does not have sufficient market share to infer monopoly power, other evidences exists of Trane' monopoly power. Specifically, witnesses testified that service contractors will be

paying higher prices for Trane genuine parts in the absence of meaningful competition from Tarrant. Thus, Tarrant argues this evidence illustrates Trane's monopoly power. This argument ignores the fact that the relevant market includes Trane genuine parts, duplicator parts and generic parts. Tarrant has not produced evidence that Trane has the ability to control prices of duplicator parts produced by other manufacturers or the prices of generic parts. Additionally, Tarrant has not produced evidence that Trane has the power to exclude competition in either generic parts or duplicator parts. Thus, Tarrant failed to produce evidence of the relevant market and Trane's alleged monopoly power within the relevant market which would present an issue of fact for the jury. For these reasons, we affirm the District Court's order granting judgment as a matter of law for Trane on the monopolization claim. Because we have affirmed the District Court's order on the monopolization claim, we decline to address Trane's other arguments in support of the District Court's decision.

IV.

Tarrant also appeals the District Court's order granting judgment as a matter of law to Trane on Tarrant's attempted monopolization claim. A claim for attempted monopolization under section two of the Sherman Act requires: (1) a specific intent to monopolize; (2) anticompetitive conduct; and (3) a dangerous probability of success. *See Arthur S. Langenderfer, Inc.* v. *S.E. Johnson, Co.*, 917 F.2d 1413, 1431 (6th Cir. 1990), *cert. denied*, 112 S. Ct. 51 (1991).

As a matter of law, the plaintiff has failed to establish the third element of its attempted monopolization claim.

> The third element of attempted monopolization is a dangerous probability of success. The greater a firm's market power the greater the probability of successful monopolization. In order to be found liable for attempted monopolization, a firm must possess market strength that approaches monopoly power—the ability to control prices and exclude competition.

Richter Concrete Corp. v. *Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982).

Market strength is often indicated by market share. However, as stated, Tarrant has failed to produce evidence of Trane's market share in the relevant product market. Furthermore, Tarrant has not produced any other evidence that Trane was capable of, much less achieved, a dangerous probability of success in destroying competition in the relevant product market or controlling prices.

Consequently, we affirm the District Court's order granting judgment as a matter of law for Trane on the attempted monopolization claim.

V.

The District Court granted Trane's post-trial motion for judgment as a matter of law but denied Trane's motion for new trial.

Under Fed. R. Civ. P. 50(c)(1),

> [i]f the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial.

In the case *sub judice,* the District Court granted Trane's motion for judgment as a matter of law and denied Trane's motion for a new trial. However, the District Court failed to specify the grounds for denying the motion. Because the District Court failed to set forth its reasons for the denial, we would ordinarily remand to the District Court for such findings. However, because we affirm the District Court's order granting judgment as a matter of law for Trane, remand on the issue is not necessary.

VI.

Trane next argues that the District Court erred in its disposition of its counterclaims against Tarrant. Trane brought counterclaims for unfair competition under the Lanham Act and state common law, for trademark infringement, and for copyright infringement.

A. Copyright

With respect to Trane's copyright claim, Trane asserted at trial that Tarrant infringed Trane's copyright when Tarrant copied Trane service literature for distribution to Tarrant's customers. The parties stipulated that Tarrant had copied Trane literature and therefore Trane had proved a prima facie case of copyright infringement. The only issue raised at trial was whether Tarrant had a valid defense to copyright infringement.

The District Court refused to submit this claim to the jury and apparently did not dispose of this copyright claim. Therefore, we remand to the District Court for disposal of this claim.

B. Trademark Infringement and Unfair Competition

At trial, Trane alleged that Tarrant had engaged in trademark infringement and unfair competition. On appeal, both sides argue that the District Court did not submit the Lanham Act unfair competition claims to the jury. While only a special interrogatory on the trademark infringement claim was submitted, the District Court clearly instructed the jury on the Lanham Act claims.[4] Thus, we conclude that the District Court did submit the majority of the unfair competition claims to the jury. Indeed, the evidence introduced on the trademark infringement claim and the unfair competition claim was virtually identical.

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[4]The District Court stated:

> Section 43 of a federal statute known as the Lanham Act provides in part as follows: Any person who in connection with any goods or services or any container for goods used in commerce any word, term, name, symbol or device or any combination thereof which is likely to cause confusion or to cause mistake or to deceive as to the affiliation such person [has] with another person or as to the origin of his or her goods or services or commercial activities by another person shall be liable in a civil action.

On appeal, Trane argues that Tarrant created a likelihood of confusion among Tarrant's customers between duplicator parts and genuine parts. Trane argues that Tarrant achieved this confusion by representing that it had Preferred Parts for Trane equipment and by using a logo similar to Trane's. Additionally, Tarrant led its customers to believe they were receiving Trane brand genuine parts when the customers were actually receiving duplicator parts. Trane argues that Tarrant misled its customers by "(1) using a parts numbering system virtually identical to that used by Trane, (2) using invoices that suggested all parts shipped were Trane-brand parts, and (3) charging customers the same price for its duplicator parts—which often cost Tarrant less to purchase—as for genuine Trane-brand parts." Defendant's Brief at 43. Tarrant defended this charge by asserting that its duplicator parts are shipped in different boxes than Trane genuine parts.

We conclude that the facts presented an issue for the trier of fact and reasonable minds could differ on the resolution of this claim. Therefore, we affirm the District Court's order denying Trane's motion for judgment as a matter of law on the trademark infringement claim and the unfair competition claims.

While the District Court did submit the majority of the unfair competition claims to the jury, we agree that the District Court's Lanham Act instruction cannot be construed as including Trane's unfair competition counterclaim based on Tarrant's misrepresentations.

At trial, Trane contended that Tarrant violated the Lanham Act by falsely representing that its duplicator parts "meet or exceed" Trane specifications without any evidence of this statement's veracity.[5] Tarrant defended this asser-

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[5]This statement arose during Trane's investigation of Tarrant's business practices. Trane's investigator pretended to be a parts customer involved in a federal project and asked Mr. Grom about Tarrant's duplicator parts. Specifically, the investigator wanted to know if Tarrant duplicator parts met "Trane specifications" because the investigator was working on a federal project. Mr. Grom responded that Tarrant's parts "meet or exceeds [sic] TRANE specifications."

tion by emphasizing that this statement was merely opinion or puffery and therefore not actionable under Lanham Act. We conclude that the District Court's jury instruction on the Lanham Act cannot be interpreted as including the alleged separate violation of the Lanham Act for Mr. Grom's statement as the instruction did not refer to false or misleading statements of fact or misrepresentations. Thus, the jury did not dispose of Trane's counterclaim based on Tarrant's "meet or exceed" statement and therefore we remand to the District Court to determine the disposition of this claim.

VII.

Section one of the Sherman Act provides, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is . . . illegal. . . ." 15 U.S.C. §1. A plaintiff must prove

> (1) that the antitrust defendant contracted, combined, or conspired; (2) that the combination or conspiracy produced adverse anticompetitive effects; (3) within relevant product and geographical markets; (4) that the objects of and conduct pursuant to that contract or conspiracy were illegal; and (5) that the plaintiff was injured as a proximate result of that conspiracy.

Chrysler, 884 F.2d at 907.

Tarrant argues that Trane conspired with the independent CSOs to eliminate Tarrant as a competitor to the CSOs by its implementation of the broker policy. The District Court granted a summary judgment against Tarrant on this claim, finding that Tarrant failed to produce evidence of a conspiracy or agreement. Tarrant now appeals the District Court's order.

We review a summary judgment order *de novo*, "making all reasonable inferences in favor of the nonmoving party to determine if a genuine issue of material fact" exists. *EEOC* v. *University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). We find that Tarrant has failed to produce any evidence of a conspiracy or combination. The record illustrates that the broker policy was unilaterally implemented

by Trane. Indeed, the CSOs' acquiescence in this policy was not needed or sought. The CSOs' mere adherence to the broker policy does not illustrate the existence of a conspiracy. *See Chrysler*, 884 F.2d at 907. Consequently, we affirm the District Court's decision granting summary judgment against Tarrant on the conspiracy claim.

VIII.

Tarrant next argues that Trane effectively created a group boycott in violation of section one of the Sherman Act by implementing the broker policy and coercing its independently-owned CSOs to cooperate with the broker policy. Tarrant argues that the independent CSOs were coerced to abide by the broker policy because Trane had the power to terminate their franchises if they refused to follow the broker policy.

Tarrant's claim is meritless. Trane unilaterally imposed the broker policy and the independent CSOs merely acquiesced in the decision. Thus, Tarrant has failed to establish any evidence of a group boycott in violation of section one of the Sherman Act and was therefore entitled to summary judgment on this claim.

IX.

For the reasons stated, we AFFIRM in part and REMAND in part.

Case No. C-91-0003-L(R)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

TARRANT SERVICE AGENCY, INC., - - - - *Plaintiff,*

v.

AMERICAN STANDARD INC.,
d/b/a THE TRANE COMPANY - - - - *Defendants.*

ORDER—Entered November 12, 1992

This matter is before the Court for consideration of Defendant's Motion for a Directed Verdict asserted both at the end of Plaintiff's case and again at the end of the presentation of all evidence.

This is an action brought in accordance with 15 U.S.C. § 2, known as "Sherman 2," wherein the Plaintiff, which previously had access to replacement and repair parts for Trane industrial air conditioners had that access terminated by the Defendant. Defendant The Trane Company determined to eliminate "brokers" such as Plaintiff, who purchased parts from it and subsequently resold them on the market. Defendant determined instead to deal only with what were known as "Commercial Sales Organizations," "CSOs."

This matter was tried to a jury from October 26, 1992 through November 5, 1992. The matter was submitted to a jury with the following three questions pertinent herein:

1. Do you unanimously find by a preponderance of the evidence that Defendant American Standard,

Inc. d/b/a/ The Trane Co. (Trane) has attained monopoly power in the relevant product market? See Instruction 4204.

2. Do you unanimously find by a preponderance of the evidence that Trane has attempted to monopolize the relevant product market? See Instruction 4205.

3. Do you unanimously find by a preponderance of the evidence that Defendant Trane had the power by reason of its monopoly or attempted monopoly to exclude competition whenever they desired to do so?

Each question was answered "Yes".

Near the end of the trial and after Plaintiff has rested, the Court was directed to the case of *International Logistics Group, Ltd.* v. *Chrysler Corporation,* 884 F.2d 904 (6th Cir. 1989). That case involved an antitrust action against Chrysler Corporation by persons engaged in the distribution of aftermarket automobile parts. Chrysler determined to cease selling parts to such persons when it learned that they had been selling a specific engine contrary to Chrysler's domestic pricing policies.

In an unpublished opinion, the Honorable Robert DeMascio, United States District Judge for the Eastern District of Michigan, granted summary judgment in favor of Chrysler. An appeal was taken to the United States Court of Appeals for the Sixth Circuit which rendered the above cited decision affirming the District Court. The following language in that Court's opinion is significant to the matter at hand.

> Obviously, Chrysler's sales to its dealers must be immediately excluded from the definitiion of relevant product market in the instant case. Chrysler could have unilaterally required its franchise dealers to purchase their parts exclusively from Chrysler. Thus, the dealer market existed at Chrysler's option. Chrysler could not be charged with restraining trade in this market . . . A manufacturer is entitled to the benefits of maintaining a 'monopoly' over products which it has developed and produced. Indeed, if manufacturers were denied a monopoly over their own

> unique prodicts, the incentives for innovation and development of beneficial products would be stifled. Accordingly, Chrysler committed no Section 2 Sherman Act violation when it implemented its marketing program for its Powermaster engines or its own manufactured parts. Monopolization of a single brand is not an antitrust violation. (Emphasis added)

Chrysler, supra at 908.

This Court considers the Chrysler case to be binding since it is a decision of the United States Court of Appeals for the Sixth Circuit.

The Court has examined the recent case of *Eastman Kodak Co.* v. *Image Technica Services, Inc.*, ___ U.S. ___, 112 S.Ct. 2072 (1992), and concludes that it dealt primarily with a "tying" situation under Sherman 1 and is not applicable to the facts involved herein.

Accordingly, applying the totality of the evidence presented herein to the Chrysler holding, the Court must find that the actions of defendant were not a violation of Section 2 of the Sherman Act. The decision of the jury finding to the contrary in its determination of the antitrust issues herein is hereby SET ASIDE. In accordance with Rule 50(b) of the Federal Rules of Civil Procedure judgment on that issue is hereby entered *non obstante verdicto* in favor of the Defendant.

Each side shall pay its own costs.

IT IS SO ORDERED

/s/ Carl B. Rubin
Carl B. Rubin, Judge
United States District Court

15 USC § 2

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch 647, § 2, 26 Stat. 209; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P.L. 93-528, § 3, 88 Stat. 1708).

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No. 93-1726

In The Supreme Court of the United States

October Term, 1993

Tarrant Service Agency, Inc.,
Petitioner,

v.

American Standard Inc.,
d/b/a The Trane Company,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit was correct in holding that a product may not be excluded from the relevant antitrust market solely because it has uses outside that market.

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IN THE

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OCTOBER TERM, 1993

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Respondent American Standard Inc., d/b/a The Trane Company ("Trane"), manufactures heating, ventilating, and air conditioning ("HVAC") equipment.[1] Trane also

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[1] The common stock of American Standard Inc. is owned by ASI Holding Corporation. Seventy-three percent of ASI Holding Corporation is owned by Kelso ASI Partners, L.P., an affiliate of Kelso & Company, L.P. The remainder of the stock of ASI Holding Corporation is privately held. No stock of ASI Holding Corporation is publicly traded.

American Standard maintains interests in about 65 separate corporations for the conduct of its business throughout the world. Many of these corporations are wholly-owned, and many are not subsidiaries, but joint ventures. The only subsidiaries of American Standard with any publicly-traded shares are Sanitary Wares Mfg. Corp. (Philippines), American Standard Sanitaryware (Thailand) Public Company Ltd., and WABCO Westinghouse S.A. (France).

manufactures, and contracts with others to manufacture, replacement parts for use in servicing its equipment. Trane distributes its original HVAC equipment as well as related repair parts and repair service through more than 80 local distributors called Commercial Sales Offices ("CSOs"). In the market for original HVAC equipment, Trane competes with a number of other manufacturers such as Carrier, York, and McQuay. In the repair parts business, Trane competes with hundreds of other suppliers.

Petitioner Tarrant Service Agency, Inc. ("Tarrant") is a mail-order parts operation. Some time prior to 1987, Tarrant began to broker Trane-brand parts on a national mail-order basis. These parts were obtained from Trane CSOs. This business grew, and at some point Tarrant also began obtaining from other suppliers an increasing number of parts that were interchangeable with Trane-brand parts (called "duplicator" parts). C.A. App. 525-527 [Ex. D, Farwell Mem. at 1-2; Tr. Vol. III-B at 48-49; Tr. Vol. VI-A at 91-92].

Because of its concerns about the impact of free-riding by Tarrant and potentially others on the local efforts of the CSOs to sell Trane-brand parts, and Tarrant's unfair trade practices,[2] Trane unilaterally decided, and announced in September of 1990, that its CSOs were not to sell Trane-brand parts to "brokers" and that Trane reserved any such sales to itself. C.A. App. 295-297 [Johnson, Tr. Vol. III-A at 31-33]. Tarrant falls within Trane's definition of a broker.

After institution of the policy, Tarrant was no longer able to obtain Trane-brand parts from CSOs in the vol-

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[2] At the time it adopted the broker policy, Trane had reason to believe that Tarrant was (i) "passing off" its duplicator parts to unsuspecting customers as genuine Trane-brand parts and (ii) making false representations to its customers that its duplicator parts "meet or exceed" Trane specifications. C.A. App. 322-31 [Johnson, Tr. Vol. IV at 38-43, 48-51].

ume it desired. Tarrant therefore increased its purchases of duplicator parts from other suppliers and by the time of trial Tarrant had tripled its sales of duplicator parts. C.A. App. 222 [Baseman, Tr. Vol. V-A at 61].

Tarrant filed a complaint in January 1991 alleging that Trane's broker policy violated Section 1 of the Sherman Act. Trane denied the allegations and filed counterclaims alleging unfair trade practices. While Trane's motion for summary judgment on Tarrant's Section 1 claim was pending, this Court rendered its decision in *Eastman Kodak Co.* v. *Image Technical Service, Inc.*, —— U.S. ——, 112 S. Ct. 2072 (1992). Immediately thereafter, Tarrant amended its complaint to add a claim under Section 2 of the Sherman Act alleging that Trane was monopolizing, or attempting to monopolize, the market for parts used to repair Trane equipment. The district court granted summary judgment for Trane on the Section 1 claim on the ground that there was no evidence of a conspiracy, and scheduled Tarrant's Section 2 claim and Trane's counterclaims for trial.[3]

Tarrant's claim was "that Trane monopolized the distribution of parts for repair of Trane equipment . . .". *Tarrant Serv. Agency, Inc.* v. *American Standard, Inc., d/b/a The Trane Company*, 12 F.3d 609, 612 (6th Cir. 1993); Pet. App. at 3a. Three general categories of parts for use in repairing Trane equipment were developed at the trial. *Id.*; Pet. App. 2a-3a. One category is those parts that are marketed by Trane and its CSOs which bear the Trane brand name. The second is the so-called "duplicator" parts that "are available from a variety of manufacturers." *Id.*; Pet. App. at 3a. The third category is so-called "generic" parts. These are parts used in the repair of Trane equipment which also have other uses.

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[3] The district court did not allow Trane time to file a summary judgment motion with respect to the Section 2 claim.

These generic parts are sold both by Trane [4] and, as Tarrant concedes, by "countless" other suppliers. Petition at 6.

REASONS FOR DENYING THE PETITION

Tarrant claimed below that Trane had monopolized, or attempted to monopolize, a market defined as parts necessary to repair and maintain Trane equipment. The essence of the court of appeals' ruling is simply that Tarrant failed to produce evidence sufficient to permit a finding that Trane had a monopoly share of the relevant market, or that for any other reason Trane had monopoly power or a dangerous probability of achieving such power. The ruling is based almost entirely on the court's accurate review of the facts established by the trial record, and presents no issue for review by this Court.

In reaching its conclusion the court below rejected Tarrant's contention "that generic parts should not be included in the relevant market because generic parts, by definition, are produced and sold for different uses." 12 F.3d at 614-15; Pet. App. at 8a. This ruling was obviously correct, and Tarrant does not challenge it here. Instead, Tarrant posits, inaccurately, that the court of appeals ruled that the relevant market "must include" generic parts as a matter of law, and that this ruling must be reviewed. Petition at 2, 6. A reading of the opinion below makes it perfectly clear that Tarrant is challenging a ruling that was never made.

The decision below does not pose a substantial issue of federal law, and is not in conflict with the decisions of this Court, or with those of the courts of appeal.

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[4] Although Trane's generic parts are sold under its brand name, they have generally been classified as generic, rather than Trane-brand, parts.

I. THE DECISION BELOW DOES NOT POSE A SUBSTANTIAL FEDERAL QUESTION

Tarrant argued to the court of appeals that the relevant market should not include all parts used in repairing Trane equipment, but should instead be limited to parts that had no other uses. "Although the service and repair of [Trane] equipment may involve some generic parts as well, those parts are not peculiar to this market and should be excluded from consideration." Brief of Plaintiff-Appellant at 12. In support of this argument, Tarrant quoted language from *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) concerning interchangeability and cited the "practical indicia" test set forth in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). However, there was no *factual* support offered for excluding generic parts from the relevant market. The claim was that simply because these parts could be used in other equipment a jury could exclude them from the mix of parts used in repairing Trane equipment.

The Sixth Circuit properly rejected this argument and explained as follows:

> Contrary to Tarrant's contention, parts need not be peculiar to a market in order to be part of a relevant market. Although generic parts can be used for a multitude of different purposes, they can certainly be used for the same purpose of repairing Trane products. Thus, generic parts have reasonable interchangeability with Trane genuine parts for the purpose of repairing Trane equipment and are part of the relevant market.

12 F.3d at 615; Pet. App. at 8a. The Sixth Circuit did *not* hold that "the relevant market must as a matter of law include generic parts." Petition at 6. Rather, the court simply held that the fact that these parts had additional uses was not a basis for excluding them from the market, and that there was no evidentiary basis shown by the record for excluding generic parts.

There is nothing remarkable about the court's holding that generic parts are not excludable from the market simply because they have other uses. *Du Pont* teaches, for example, that cellophane is in the same product market as other flexible wrapping materials. It follows that these products compete for, among other things, the business of wrapping cigarette packages, and it is irrelevant that cellophane and the competing products have other uses.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR THE COURTS OF APPEAL

The decision below is not in conflict with decisions of this Court or the courts of appeal. None of the "practical indicia" referred to by this Court in *Brown Shoe* were proved by Tarrant to indicate that Trane's sales of generic parts were insulated from competition from other sellers of generic parts. Significantly, Tarrant cited no such evidence to the court below in connection with its citation to *Brown Shoe*. Brief for Plaintiff-Appellant at 13; Reply Brief for Plaintiff-Appellant at 11-12.

Tarrant also now argues that the decision below is in conflict with *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), *United States* v. *Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990), and *California* v. *American Stores Co.*, 697 F. Supp. 1125 (C.D. Cal. 1988), *aff'd*, 872 F.2d 837 (9th Cir. 1989), *rev'd on other grounds*, 495 U.S. 271 (1990). Petition at 10-12. Each of these cases stands only for the proposition that it may be appropriate in defining the line of commerce or product market which might be impacted by a merger or acquisition to take account of only those firms that market the same package of products that are marketed by the defendant. Since Trane markets both Trane-brand and generic parts, these cases are clearly not authority for excluding generic parts

from the relevant market in this case.[5] They are, if anything, authority for including such parts.

In any event, since this argument was not made by Tarrant to the court below, none of these cases were cited to the Sixth Circuit. There is nothing in the decision that even suggests a conflict with these authorities.[6]

Tarrant also argues that the decision below "eviscerates *Kodak*". Petition at 6. Nothing could be further from the truth. The Sixth Circuit did not question that, on appropriate facts, a relevant market could be defined by the defendant's brand name.[7] This may occur, as in *Kodak*, "when the product is unique and no reasonable substitutes exist." 12 F.3d at 614; Pet. App. at 7a. In view of the duplicator parts marketed by Tarrant, Petition at 8, and many others, and the generic parts "available from a multitude of sources," *id.* at 7, it is apparent that this is not a case where a brand name defines the relevant market. Tarrant itself acknowledges this when it asserts that the non-brand duplicator parts are a part of the relevant market.

The court below took full account of *Kodak* and properly distinguished it because, in view of the competition Trane faces from duplicator and generic parts, "this case does not represent one of those circumstances where a

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[5] Tarrant's argument that prices of generic parts do not affect prices of other parts is an obvious red herring. Petition at 12. The question is whether the prices of non-Trane-brand generic parts affect the prices of Trane-brand generic parts. Tarrant produced no evidence that they do not. Generic parts cannot be excluded from the market simply because prices for, say, gaskets do not affect prices for compressors.

[6] This Court has recently observed that it should not decide an issue that "was not raised, argued, or decided below. . .". *Powell* v. *Nevada*, —— U.S. ——, 114 S. Ct. 1280, 1284 fn. (1994).

[7] It is notable that if the market were defined here to include Trane-brand parts, it would include the generic parts sold by Trane.

single product constitutes a relevant market." 12 F.3d at 614; Pet. App. at 7a.

III. THE RECORD DOES NOT SUPPORT EXCLUSION OF GENERIC PARTS FROM THE RELEVANT MARKET

There is no basis for this Court to appraise the factual record differently than did the Sixth Circuit. As plaintiff below, Tarrant bore the burden of proving a relevant market and, specifically, that generic parts should be excluded from it. *See Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 29-31 (1984). Each of Tarrant's own witnesses who testified as to the relevant market testified that generic parts are a part of that market. Tarrant's market expert, Donald Blumberg, testified that the market consisted of those parts used to repair Trane equipment including "more generalized parts rather than specific parts for the Trane product." C.A. App. 229-30 [Blumberg, Tr. Vol. II at 22-23]. Mr. Blumberg never mentioned the distinction between duplicator and generic parts which Tarrant now asserts, and certainly did not try to identify any "practical indicia" that could insulate Trane from the competition of other suppliers of generic parts.

Tarrant's other market definition witness, Joseph Grom, was even more explicit. When specifically asked whether he included generic parts in his definition, he testified as follows:

> A. It does.
>
> Q. It includes all the belts, pulleys and shafts and all that stuff we talked about this morning?
>
> A. Belts, pulleys, relays, capacitors, yeah.

C.A. App. 260 [Grom, Tr. Vol. II at 123]. Notwithstanding this testimony from its own vice-president, Tarrant argued on appeal that the market should exclude generic parts, defined as "belts, pulleys, electric motors,

electrical contractors [sic], bolts, nuts and the like." Brief for Plaintiff-Appellant at 6.

There is no evidence to support Tarrant's argument that generic parts should be excluded from the relevant market.[8] Parts used to repair Trane equipment are available from numerous sources which supply parts directly competitive with the Trane-brand parts. The service contractors and equipment owners who buy these parts are sophisticated price- and quality-conscious purchasers. There is no evidence that there is any competitive significance to the fact that some sellers of generic parts do not also sell parts that only go into Trane equipment. Petition at 6-7.[9] Trane's CSOs sell both types of parts. Tarrant itself sells some, but not all, of the generic parts used in repairing Trane equipment, as well as the duplicator parts. C.A. App. 258 [Grom, Tr. Vol. II at 113]. These sellers, and the many other suppliers of generic and duplicator parts, sell to the same buyers (service contractors and equipment owners) for the same purpose (repairing installed Trane equipment). There is vigorous competition, and Trane and its CSOs are clearly not isolated from the competition of these numerous other suppliers. *See Thurman Indus., Inc.* v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1376 (9th Cir. 1989) (rejecting submarket limited to home center stores where more specialized stores provided additional competition).

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[8] Sometime during the trial, but after these witnesses had testified, Tarrant realized that it could not possibly prove its claim that Trane had a dominant market share in a market consisting of all the parts used in repairing Trane equipment. Counsel for Tarrant thereupon shifted ground and began to argue that the market should include only those parts that have no use other than the repair of Trane equipment. No effort was made to bolster this belated new claim with evidentiary support.

[9] Tarrant states there "was ample evidence in the record" to support exclusion of generic parts from the market but, significantly, no such evidence is cited. Petition at 7.

The court below also concluded that Tarrant had not proved that Trane has the power to control prices of duplicator or generic parts, or the power to prevent entry into these lines of business. 12 F.3d at 615; Pet. App. at 8a-9a. Tarrant does not challenge this ruling, and its own ability to market a line of duplicator parts directly competitive with Trane-brand parts is clear testimony as to its validity. At the time of trial, Tarrant's duplicator line of parts was up to 1,200 different parts, and its volume of sales of these parts had about trebled since 1990. As these facts show, no structural barriers to entry into the market exist. Further expansion by Tarrant and others into this business is unhindered by anything except normal competitive considerations.

IV. THE PETITION PRESENTS NO OTHER REASON FOR REVIEW BY THIS COURT

The decision below reflects nothing more than a careful review of the trial record by the court of appeals, and a conclusion based thereon that Tarrant had failed to prove the market power that was necessary for it to obtain a judgment under Section 2 of the Sherman Act. The only ruling of federal law made by the court in this factual review was that Tarrant was incorrect in contending that generic parts should be excluded from the market simply because they have additional uses. This ruling is obviously unassailable, and is not challenged here. No important issue of federal law is posed by the decision below, and no reason exists for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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No. 93-1726

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

TARRANT SERVICE AGENCY, INC., - Petitioner,

versus

AMERICAN STANDARD, INC.,
d/b/a THE TRANE COMPANY, - - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED BY PETITIONER

In a case alleging monopolization under Section 2 of the Sherman Act, must the relevant market for parts to repair and service durable goods necessarily include generic parts which are not peculiar to the durable goods themselves?

QUESTION AS STATED BY RESPONDENT

Whether the Sixth Circuit was correct in holding that a product may not be excluded from the relevant antitrust market solely because it has uses outside that market.

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COMPARISON OF STATEMENTS OF QUESTION PRESENTED

Respondent, American Standard, Inc., d/b/a The Trane Company ("Trane") has rephrased the question presented by Petitioner, Tarrant Service Agency, Inc. ("Tarrant"), in

such a way as to divert the focus of the petition. Tarrant asks "must the relevant market for parts to repair and service durable goods *necessarily include* generic parts which are not peculiar to the durable goods themselves?" Respondent changes the question to ask whether a product *may not be excluded* from the relevant antitrust market solely because it has uses outside that market. (Emphasis added). The difference in phraseology is not trivial. The manner in which this Court perceives the question may significantly influence its analysis of the underlying reasons supporting a grant of the petition. The Sixth Circuit Court of Appeals clearly stated that ". . . generic parts . . . are part of the relevant market." Pet. App. at 8a. This is a categorical appellate determination as to the proper elements of the relevant market in the aftermarket for service and repair of durable goods, which has markedly different ramifications from approaching this petition from the perspective of whether a product may not be excluded, as will be more fully demonstrated below.

STATEMENT OF THE CASE

Trane's Statement of the Case has set forth most of the facts with substantial correctness. However, there are several assertions which distort the real issue presented by this Petition. Trane states that in the repair parts business it competes with hundreds of other suppliers. Resp. at 2. Recognizing that the issue of this appeal involves the distinction between Trane genuine parts and duplicator parts, on the one hand, and generic parts on the other, the above statement regarding the extent of competition faced by Trane ignores that distinction. The number of competitors in the market excluding generic parts is dramatically smaller than in that including such parts.

Trane has repeatedly characterized Tarrant as a mail order parts operation. No definition having been given for this term of art, its use was intended to convey all nega-

tive connotations normally associated with those words. The truth, however, is that Tarrant is a legitimate highly capitalized, deeply invested, service oriented organization whose business consists exclusively of selling parts for and providing advice on the service and repair of Trane HVAC equipment.

Trane's characterization of Tarrant's history in the sale of parts for Trane equipment ignores important facts concerning Tarrant's prior relationship with Trane. Tarrant operated as a Trane Commercial Sales Office ("CSO") in Louisville, Kentucky from 1970 until 1976, when Tarrant became an authorized parts outlet ("APO") for Trane. This relationship continued until 1986. when Trane decided to eliminate the APO System, leaving Tarrant with no alternative in the continuation of its Trane parts business but to begin acquiring Trane parts through Trane's CSO's. This it did in the open market. Although Tarrant found it necessary to supplement these sources through the acquisition of some duplicator parts, its procurement of Trane genuine parts from the CSO's continued with Trane's knowledge and acquiescence until 1990 when Trane instituted its Broker Policy. (Lane Tarrant, TR Vol. 1, 53-65).

The alleged justifications for the Broker Policy were presented at trial and were clearly rejected by the jury. Trane asserts that Tarrant fell within Trane's definition of a broker, but neglect to state that at the time of trial Tarrant was the only dealer who was so classified under the Broker Policy. (William Johnson, TR Vol. 3A, 14).

RESPONSE TO ARGUMENTS IN OPPOSITION TO PETITION

Trane's characterization of the ruling by the Circuit Court of Appeals is inaccurate. Unquestionably, the Court of Appeals determined, as a matter of law, that generic parts should be included in the relevant market for the

service and repair of Trane HVAC equipment. Once that determination had been made, albeit incorrectly in Tarrant's view, the Court of Appeals had little difficulty in finding that Tarrant had failed to produce evidence of monopoly power in that expanded market definition.

It is important that the distinction between determining the proper elements of the relevant market and proving those elements be kept in mind in analyzing this Petition. To state that the Court of Appeals had not ruled that the relevant market must include generic parts as a matter of law is to ignore the very language of the decision. ". . . generic parts . . . are part of the relevant market." Pet. App. at 8a.

Trane suggests that the Sixth Circuit decision in this case is consistent with *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, ___ U.S. ___, 112 S.Ct. 2072 (1992), on the assumption that the settings of these two cases are effectively identical. But they are not. The factual situations are critically different: In *Kodak*, the aftermarket parts were available solely from the manufacturer of the equipment. Whether generic parts of any significance entered into the repair and servicing of *Kodak* copiers was not an issue discussed in that opinion. In the present case, the availability of duplicator parts creates a larger market, but one which is nevertheless susceptible to monopolization by the original equipment manufacturer.

Although, on its facts, *Kodak* proscribed monopolization in single source aftermarkets, it should not be so narrowly applied. In the current state of technological development, the United States economy contains very significant aftermarkets for the service and repair of durable goods of all kinds, and the impact of monopolization and attempted monopolization of those aftermarkets by the manufacturers of original equipment clearly deserves further examination. To preclude such inquiry in those cases

where *some* competition exists does a disservice to the therapeutic influence which *Kodak* may have on aftermarkets in general.

In the instant situation Trane sells parts for the service and repair of its equipment. Some of those parts are available only from Trane and a smaller number are available from Trane and duplicator sources. To be sure, Trane may market generic parts under its label although such parts are available from a wide variety of other sources. However, to necessarily include generic parts in the definition of relevant market for the service and repair of Trane equipment is to ignore the commercial realities in this and other aftermarkets for service and repair of durable goods. Purchasers of the non-generic parts have limited sources from which to acquire those items, and dominance of that market by the original equipment manufacturer can have serious anti-competitive influences on the prices of such parts.

Trane attacks Tarrant for having provided no factual support for excluding generic parts from the relevant market. Such a challenge is tantamount to demanding clairvoyance on Tarrant's part in prosecuting its appeal in order to have anticipated the rationale which would be the foundation of the Sixth Circuit opinion.

Tarrant did submit proof as to the relevant market comprised of Trane genuine parts and duplicator parts. Furthermore, the jury was clearly instructed at trial that the relevant market could consist of any combination of Trane genuine, duplicator and generic parts. In the absence of proof of monopolization as to generic parts, it is clear that the jury's verdict was based on a relevant market consisting, at most, of Trane genuine and duplicator parts.

Trane's efforts to call upon the decision in *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) to

support its argument fails to recognize a critical factual distinction between *duPont* and this case. The *duPont* decision did not address an aftermarket, but rather a conventional market for products sold and purchased without regard to any other specific products with which they might be used.

Although the decisions in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), *United States* v. *Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.) *cert. denied* 498 U.S. 920 (1990), and *California* v. *American Stores Company*, 697 F.Sup. 1125 (C.D. Cal. 1988), aff'd, 872 F.2d 837 (9th Cir. 1989), *rev'd on other grounds*, 495 U.S. 271 (1990), may have been addressed to questions of merger and acquisition, their reasoning with respect to "clustering" is equally applicable to the anti-trust analysis of aftermarkets. To be sure, none of these cases were presented to the Sixth Circuit as the trial court decision on appeal was not founded on the inclusion or exclusion of any specific element of the relevant market.

Trane argues that Tarrant bore the burden of proving the relevant market and that it further bore the burden of proving that generic parts should be excluded from that market. What Trane did prove, and all that was necessary under its relevant market definition, was the existence of a market consisting either of Trane genuine parts alone or Trane genuine parts plus duplicator parts. As stated above, based upon this proof and the instructions of the trial judge, the jury did find a relevant market which necessarily excluded generic parts as no proof was presented regarding Trane's monopolization of a market including generic parts.

The testimony of Joseph Grom does not negate the finding of the jury. Mr. Grom is a layman, not an expert witness, and his responses to interrogation were given from the perspective of a person familiar with the HVAC equip-

ment parts business, and not with the subtleties of anti-trust relevant market definition.

Contrary to Trane's assertion, evidence was presented regarding the price sensitivity in the relevant market of Trane genuine parts and duplicator parts. (John Samsa, TR Vol. 2, 153-155; Wesley Burns, TR Vol. 2, 169; Darrell Scarborough, TR Vol. 2, 180-183; Donald Blumberg, TR Vol. 2, 42). From that evidence the jury was free to find that Trane's monopolization of that relevant market justified its verdict in favor of Tarrant.

In summary, Tarrant urges the Court to accept this Petition in order to explore more fully the impact of monopolistic practices in aftermarkets for the repair and service of durable goods, a subject which was opened, but not closed, by the *Kodak* decision. The interest of the consuming public will be better served if competition in all such aftermarkets is promoted rather than deterred through the application of the Federal anti-trust laws.

CONCLUSION

For these reasons and those set forth more full in the Petition, a writ of certiorari should be granted.

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